



022 #
84-1175

Rep. of Justice

Washington, D.C. 20530

March 23, 1984

To:

Central Intelligence Agency

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National Security Agency

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Paul Thompson
National Security Council

From:

Dan Bensing *DB*
Civil Division

Re: Latest Information on H.R. 4681

Attached, for your information, are amendments drafted by Congresswoman Schroeder's staff, in consultation with staff of the House Intelligence and Armed Services Committees, in an effort to avoid a sequential referral to those committees.

Also attached is the letter Schroeder sent to Ford and McFarlane's letter to Schroeder.

Attachments

AMENDMENTS OFFERED BY _____
TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE
OFFERED BY MRS. SCHROEDER

Page 4, line 2, strike out ''An'' and insert in lieu thereof ''Except as provided in section 7365 of this title, an''.

Page 6, line 9, strike out ''An'' and insert in lieu thereof ''Except as provided in section 7365 of this title, an''.

Page 8, line 17, strike out ''Exemptions'' and insert in lieu thereof ''Exceptions''.

Page 8, line 18, insert ''(a)'' before ''Sections''.

Page 9, line 6, strike out the closing quotation marks and the final period and add thereafter the following new subsection:

1 ''(b)(1) For purposes of this subsection--

1 ''(A) the term 'covered agency' means the Department
2 of Defense, the Federal Bureau of Investigation, the
3 Federal Emergency Management Agency, and any other
4 agency (other than the Central Intelligence Agency or
5 the National Security Agency) which employs individuals
6 in positions the primary duties of which involve
7 cryptographic communications or technology;

8 ''(B) the term 'covered employee'--

9 ''(i) as used with respect to the Department of
10 Defense, the Federal Bureau of Investigation, or the
11 Federal Emergency Management Agency, means an
12 individual employed by or detailed to the agency, an
13 individual applying for a position in the agency,
14 and an expert or consultant under contract with the
15 agency, who has regular and continuous access to
16 covered information as such an employee (or, in the
17 case of an individual applying for a position, would
18 have such access to covered information in such
19 position); and

20 ''(ii) as used with respect to any other covered
21 agency, means an individual employed by or detailed
22 to the agency, an individual applying for a position
23 in the agency, and an expert or consultant under
24 contract with the agency, who so has (or would so
25 have) regular and continuous access to covered

1 information within the meaning of subparagraph
2 (C)(ii); and

3 '(C) the term 'covered information' means
4 particularly sensitive classified information--

5 '(i) subject to a special access program
6 established in accordance with the provisions of
7 section 4.2(a) of Executive Order 12356, as in
8 effect on the effective date of the Federal
9 Polygraph Limitation and Anti-Censorship Act of
10 1984; or

11 '(ii) concerning cryptographic communications
12 or technology.

13 '(2) Under regulations issued by the President, the
14 head of a covered agency may impose the special security
15 procedures specified in paragraph (3) or (4), or both, with
16 respect to a covered employee of such covered agency.

17 '(3)(A) A covered agency may, as a condition for access
18 to covered information, require a covered employee to enter
19 into an agreement requiring the individual to submit for
20 prepublication review those portions of any writings of such
21 individual which such individual reasonably believes might
22 contain covered information.

23 '(B) Nothing in section 7363 of this title shall
24 prevent the enforcement of an agreement requiring
25 prepublication review as described in subparagraph (A).

1 ''(4) A covered agency may, as a condition for access to
2 covered information, require a covered employee to submit to
3 a polygraph examination, subject to the following
4 conditions:

5 ''(A) The head of a covered agency may require a
6 covered employee to submit to a polygraph examination
7 only if the agency head determines, in writing, that
8 such covered employee has (or, in the case of an
9 applicant, would have) access to covered information,
10 the unauthorized disclosure of which could reasonably be
11 expected to result directly in the loss of--

12 ''(i) human life;

13 ''(ii) intelligence sources or methods which are
14 vital to the fulfillment of national security
15 requirements or which provide a unique capacity to
16 intelligence agencies of the United States; or

17 ''(iii) technologies, plans, or procedures vital
18 to the strategic advantage of the United States.

19 ''(B) A polygraph examination under this paragraph--

20 ''(i) shall be limited to questions designed to
21 ascertain whether the covered employee has
22 committed, is committing, or intends to commit
23 espionage against the United States; and

24 ''(ii) may be administered only as provided in
25 section 7362(b)(2) of this title.

1 ''(C)(i) A covered agency may not take or threaten
2 to take any action against a covered employee, or fail
3 to take or threaten to fail to take any action on behalf
4 of a covered employee, on the basis of any inference or
5 determination (referred to in section 7361(4) of this
6 title) made from that individual's performance in the
7 course of a polygraph examination, unless the
8 appropriate agency head personally determines, in
9 writing, that a decision not to carry out the measure
10 concerned would pose an unacceptable risk to national
11 security.

12 ''(ii) For purposes of clause (i), the term 'measure
13 concerned' means the taking or threatening to take an
14 action against a covered employee, or the failing to
15 take or threatening to fail to take an action on behalf
16 of a covered employee, as referred to in such clause.

17 ''(5)(A) Before placing an individual in a position
18 which is subject to the special security procedures
19 specified in paragraph (3) or (4), or which the covered
20 agency, with reasonable certainty, anticipates will be made
21 subject to such procedures during the individual's expected
22 tenure, such agency shall--

23 ''(i) provide written notice informing the
24 individual--

25 ''(I) of the fact that the position is subject

1 to those procedures, or

2 '(II) of the agency's intention to make the
3 position subject to those procedures (including the
4 anticipated effective date),

5 as the case may be; and

6 '(ii) provide to such individual a copy of the then-
7 current regulations under paragraph (2) which apply to
8 such position, or which would apply to such position if
9 it were then so subject to those procedures, as the case
10 may be.

11 '(B)(i) Notwithstanding any other provision of law, the
12 failure of an individual described in clause (ii) to comply
13 with any of the special security procedures specified in
14 paragraph (3) or (4) may serve as the basis for denying or
15 withdrawing clearance for access to covered information in
16 the case of such individual, but may not be considered for
17 purposes of any decision concerning separation, a reduction
18 in grade or pay, or other action against such individual.

19 '(ii) An individual shall be considered to be an
20 individual described in this clause if such individual--

21 '(I) is holding a position as of the date on which
22 it first becomes subject to any of the special security
23 procedures specified in paragraph (3) or (4); and

24 '(II) was afforded no advance notice under
25 subparagraph (A)(i)(II) with respect to such position.

1 ''(6) The President shall submit to each House of the
2 Congress for each calendar year beginning after the
3 effective date of the Federal Polygraph Limitation and Anti-
4 Censorship Act of 1984 a report which shall include--

5 ''(A) a list identifying each agency which was a
6 covered agency during any part of the year;

7 ''(B) the number of covered employees within each
8 such agency during such year;

9 ''(C) the number of covered employees, in the
10 aggregate and by agency, required to enter into an
11 agreement under paragraph (3) during such year;

12 ''(D) the number of covered employees, in the
13 aggregate and by agency, subject to any agreement under
14 paragraph (3) during such year;

15 ''(E) the number of writings submitted during such
16 year in accordance with any agreement entered into under
17 paragraph (3); and

18 ''(F) the number of covered employees, in the
19 aggregate and by agency, required to submit to a
20 polygraph examination under paragraph (4) during such
21 year.''.
.

Page 9, in the matter after line 8 and before line 9,
strike out the item relating to section 7365 and insert in

lieu thereof the following:

''7365. Exceptions.''.

Page 9, strike out line 20 and all that follows thereafter through page 10, line 2, and insert in lieu thereof the following new subsection:

- 1 (b) Nothing in subsection (a) applies with respect--
- 2 (1) to the Central Intelligence Agency or the
- 3 National Security Agency, or to any agreement which
- 4 requires prepublication review by either of those
- 5 agencies; or
- 6 (2) to--
- 7 (A) a covered agency, as defined in subsection
- 8 (b) of section 7365 of title 5, United States Code
- 9 (as added by this Act) with respect to any agreement
- 10 which requires prepublication review by such covered
- 11 agency, but only to the extent that such agreement
- 12 would be permitted under paragraph (3) of such
- 13 subsection; or
- 14 (B) any such agreement, to such extent.

[COMMITTEE PRINT]

MARCH 19, 1984

[Amendment in the nature of a substitute to H.R. 4681]

Offered by Mrs. SCHROEDER

1 Strike out all after the enacting clause and insert in lieu
2 thereof the following:

3 That this Act may be cited as the "Federal Polygraph Limi-
4 tation and Anti-Censorship Act of 1984".

5 SEC. 2. (a) Chapter 73 of title 5, United States Code, is
6 amended by adding at the end thereof the following new
7 subchapter:

8 "SUBCHAPTER VI—POLYGRAPH EXAMINATION
9 AND PREPUBLICATION REVIEW RESTRIC-
10 TIONS

11 "§ 7361. Definitions

12 "For purposes of this subchapter—

13 "(1) the term 'agency' means—

14 "(A) an Executive agency;

15 "(B) the United States Postal Service;

16 "(C) the Postal Rate Commission;

17 "(D) the Administrative Office of the United
18 States Courts;

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1 “(E) the Library of Congress;

2 “(F) the Government Printing Office;

3 “(G) the Office of Technology Assessment;

4 “(H) the Congressional Budget Office;

5 “(I) the Office of the Architect of the Cap-
6 itol; and

7 “(J) the Botanic Garden;

8 “(2) the term ‘employee’ means—

9 “(A) an individual employed by an agency;

10 “(B) a Congressional employee (other than
11 an individual under subparagraph (A)); and

12 “(C) an expert or consultant who is under
13 contract under section 3109 of this title with an
14 agency, including, in the case of an organization
15 performing services under such section, an
16 individual involved in the performance of such
17 services;

18 “(3) the term ‘classified information’ means
19 information—

20 “(A) specifically authorized under criteria es-
21 tablished by statute or Executive order to be kept
22 secret in the interest of national defense or foreign
23 policy; and

24 “(B) in fact properly classified pursuant to
25 such statute or Executive order;

1 “(4) the term ‘polygraph examination’ means an
2 interview with an individual which involves the use of
3 a device designed to permit the examiner to make an
4 inference or a determination, by evaluation of meas-
5 ured physiological responses, concerning whether the
6 individual has truthfully or deceptively responded to
7 inquiries made in such interview;

8 “(5) the term ‘action’, as used with respect to an
9 employee or applicant for employment, means—

10 “(A) a personnel action under clauses (i)
11 through (x) of section 2302(a)(2)(A) of this title;

12 “(B) a decision concerning clearance for
13 access to classified information; and

14 “(C) a performance evaluation (other than
15 under chapter 43 of this title);

16 in the case of such employee or applicant; and

17 “(6) the term ‘prepublication review’ means sub-
18 mission of information to an agency for the purpose of
19 permitting such agency to examine, alter, excise, or
20 otherwise edit or censor such information before it is
21 publicly disclosed, but does not include any such sub-
22 mission with respect to information which is to be dis-
23 closed by an employee in such employee’s official
24 capacity.

1 "§ 7362. Restrictions relating to polygraph examinations
2 *Except as provided in section 7365, of this title,*
3 "(a) An agency may not—

4 "(1) require, threaten to require, or, except as
5 provided in subsection (b), request any employee or
6 applicant for employment to submit to a polygraph
7 examination;

8 "(2) take, or threaten to take, any action against
9 an employee or applicant for employment—

10 "(A) on the basis of that individual's refusal
11 to submit to a polygraph examination; or

12 "(B) on the basis of any inference or deter-
13 mination (referred to in section 7361(4) of this
14 title) made from that individual's performance in
15 the course of a polygraph examination; or

16 "(3) fail to take, or threaten to fail to take, any
17 action on behalf of an employee or applicant for
18 employment—

19 "(A) on the basis of that individual's refusal
20 to submit to a polygraph examination; or

21 "(B) on the basis of any inference or deter-
22 mination described in paragraph (2)(B).

23 "(b)(1) An agency may request an employee, in writing,
24 to submit voluntarily to a polygraph examination—

25 "(A) if the examination is administered as part of
a specific investigation into alleged criminal conduct—

5

1 “(i) after the completion, by other means, of
2 as thorough an investigation as circumstances
3 reasonably permit; and

4 “(ii) solely for the development of informa-
5 tion essential to that investigation;

6 “(B) if the individual is reasonably believed to
7 have knowledge of the matter under investigation; and

8 “(C) if the alleged criminal conduct constitutes an
9 offense punishable by death or imprisonment for a term
10 exceeding one year.

11 “(2) A polygraph examination under this subsection may
12 be administered only by an individual employed by, and
13 under the direction of—

14 “(A) the Central Intelligence Agency;

15 “(B) the National Security Agency;

16 “(C) the Federal Bureau of Investigation;

17 “(D) the United States Secret Service;

18 “(E) the Drug Enforcement Administration;

19 “(F) the Bureau of Alcohol, Tobacco, and Fire-
20 arms;

21 “(G) the Postal Inspection Service, United States
22 Postal Service;

23 “(H) the Intelligence and Security Command,
24 United States Army;

6

1 “(I) the Criminal Investigation Command, United
2 States Army;

3 “(J) the Naval Investigative Service, Department
4 of the Navy;

5 “(K) the Office of Special Investigations, Depart-
6 ment of the Air Force; or

7 “(L) the Marine Corps.

8 “§ 7363. Restrictions relating to prepublication review
9 *Except as provided in section 7365 of this title,*
 An agency may not—

10 “(1) request, require, or threaten to require, an
11 employee or applicant for employment to enter into an
12 agreement, any part of which requires prepublication
13 review;

14 “(2) take, or threaten to take, any action against
15 an employee or applicant for employment on the basis
16 of that individual's refusal to enter into such an
17 agreement;

18 “(3) take, or threaten to take, any action against
19 an employee or applicant for employment on the basis
20 of that individual's refusal to comply with any of the
21 provisions of such an agreement which require pre-
22 publication review;

23 “(4) fail to take, or threaten to fail to take, any
24 action on behalf of an employee or applicant for em-

1 ployment on the basis of a refusal referred to in
2 paragraph (2) or (3); or

3 “(5) establish or enforce, or threaten to establish
4 or enforce, any other requirement in order to compel
5 prepublication review.

6 **“§ 7364. Remedies**

7 “(a)(1) Subject to paragraph (2) and subsection (b), any
8 person aggrieved by a violation of section 7362 or 7363 of
9 this title may bring a civil action against the United States
10 for equitable or monetary relief, or both, in the district court
11 of the United States for the district in which that person
12 resides, for the District of Columbia, or, in the case of an
13 employee or former employee, for the district in which that
14 person was employed at the time the cause of action arose.

15 “(2) A civil action under this subsection shall be forever
16 barred unless commenced within two years after the cause of
17 action arose. For purposes of this paragraph, a cause of
18 action shall be deemed to have arisen on the date that the
19 person aggrieved knew, or with reasonable diligence should
20 have known, of the violation concerned.

21 “(3) The court shall award reasonable costs of litigation,
22 and may award reasonable attorney fees, to a prevailing
23 plaintiff in an action brought under this subsection.

24 “(b)(1) If a person aggrieved by a violation of section
25 7362 or 7363 of this title would also be entitled to initiate

1 proceedings for remedial action under agency administrative
 2 procedures, such person may raise the matter under subsec-
 3 tion (a) or under such administrative procedures, but not
 4 both.

5 “(2) A person shall be deemed to have exercised the
 6 option under this subsection to raise a matter either under
 7 subsection (a) or under agency administrative procedures
 8 upon the timely commencement of an action by such person
 9 in accordance with the Federal Rules of Civil Procedure or
 10 the timely initiation of such administrative procedures by
 11 such person, as the case may be.

12 “(3) For purposes of this subsection, the term ‘agency
 13 administrative procedures’ means any formal process of
 14 review by an agency provided under statute, regulation, or
 15 Executive order, including judicial review of any determina-
 16 tion made in the course of such process.

17 ^{Exceptions}
 “§ 7365. ~~Exemptions~~

18 ^(a)
 “Sections 7362 and 7363 of this title do not apply—

19 “(1) to the Central Intelligence Agency, in the
 20 case of any individual employed by, or detailed to, the
 21 Central Intelligence Agency, any individual applying
 22 for a position in the Central Intelligence Agency, or
 23 any expert or consultant under contract with the
 24 Central Intelligence Agency; or

1 “(2) to the National Security Agency, in the case
2 of any individual employed by, or detailed to, the Na-
3 tional Security Agency, any individual applying for a
4 position in the National Security Agency, or any
5 expert or consultant under contract with the National
6 Security Agency.”

7 **(b) NEW**
8 (b) The analysis for chapter 73 of title 5, United States
Code, is amended by adding at the end thereof the following:

“SUBCHAPTER VI—POLYGRAPH EXAMINATION AND
PREPUBLICATION REVIEW RESTRICTIONS

“7361. Definitions.

“7362. Restrictions relating to polygraph examinations.

“7363. Restrictions relating to prepublication review.

“7364. Remedies.

“7365. Exemptions.”.

9 SEC. 3. (a)(1) The provisions of any agreement referred
10 to in section 7363(1) of title 5, United States Code (as added
11 by this Act) are, to the extent that such provisions relate to
12 prepublication review, hereby rescinded.

13 (2) The head of each agency concerned shall provide
14 written notice to each individual who, immediately before this
15 Act takes effect, was a party to any such agreement, inform-
16 ing such individual of—

17 (A) the enactment of this section; and

18 (B) the provisions of the agreement rescinded as a
19 result of the enactment of this section.

Insert 20 ~~(b) Nothing in subsection (a) applies with respect to the~~
21 ~~Central Intelligence Agency or the National Security~~

10

1 ~~Agency, or to any agreement which requires prepublication~~
2 ~~review by either of those agencies.~~

3 (c) For purposes of this section, "prepublication review"
4 and "agency" each has the meaning given that term in sec-
5 tion 7361 of title 5, United States Code (as added by this
6 Act).

7 SEC. 4. This Act shall take effect on April 15, 1984.

○

PATRICIA SCHROEDER, COLO., CHAIRWOMAN
MORRIS K. UDALL, ARIZ.
EATIE HALL, IND.
GERRY SIKORSKI, MINN.
CHARLES PASHAYAN, JR., CALIF.
FRANK R. WOLF, VA.

U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE

122 CANNON HOUSE OFFICE BUILDING

Washington, D.C. 20515

TELEPHONE (202) 225-4025

March 20, 1984

Hon. William D. Ford
Chairman
Committee on Post Office and Civil Service
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I request that the meeting of the Committee on Post Office and Civil Service to consider H.R. 4681, the Federal Polygraph Limitation and Anti-Censorship Act of 1984, planned for tomorrow, March 21, be postponed for a week, until Wednesday, March 28.

For the past few weeks, the staff of the Committee on Post Office and Civil Service has been working with staff representatives of other committees of Congress to reach an agreement on the coverage of this legislation. I can report that considerable progress has been made. In fact, I had hoped that a broad-based agreement could have been developed prior to tomorrow's meeting of our committee. Unfortunately, this has not been attainable. An extra week should provide the time necessary to reconcile the few remaining differences.

Moreover, I have today received the attached letter from Robert C. McFarlane, the national security advisor to the President. In this letter, Mr. McFarlane makes plain that the prepublication review and polygraph provisions of National Security Decision Directive 84 will not be reinstated during the remainder of this session of Congress. This assurance convinces me that a week's delay in our consideration of H.R. 4681 will not prove detrimental to civil servants.

Hon. William D. Ford
March 20, 1984
Page 2

While the letter from Mr. McFarlane does clarify the status of National Security Decision Directive 84, it does not address other important issues raised in H.R. 4681. The letter does not speak to proposed amendments to Department of Defense Directive No. 5210.48 which would expand the use of polygraphs within the Defense Department. Nor does the letter address the position to be taken by the Administration concerning enforcement of prepublication review agreements which have already been signed by civil servants. I will be asking the Administration for further clarification of these issues over the next week.

I appreciate your cooperation with this request.

With kind regards,

Sincerely,

A handwritten signature in cursive script, appearing to read "Patricia Schroeder".

PATRICIA SCHROEDER
Chairwoman

Attachment

THE WHITE HOUSE

WASHINGTON

March 20, 1984

Dear Madame Chairwoman:

It has come to my attention that, in the course of your Subcommittee's consideration of H.R. 4681, questions have arisen as to the status of two provisions of National Security Decision Directive 84 (NSDD-84). I am writing to clarify the status of that directive.

The President issued NSDD-84 because of serious concern about the damage to intelligence sources caused by unauthorized disclosures of classified information. Both anonymous leaks to the press and unauthorized disclosures in the writings of former officials have caused losses of sensitive intelligence information. This has been a problem in past administrations as well, prompting the congressional intelligence committees to urge more vigorous action in investigating and prosecuting leak cases.

Following the adoption of NSDD-84 in March of last year, however, various Members of Congress expressed concern about two provisions of the directive: paragraph 1(b), which authorized broader use of prepublication clearance agreements, and paragraph 5, relating to the use of the polygraph in leak investigations. Amendments to the State and Defense Authorization bills were adopted last year barring the Administration from implementing either of these two proposals until April 15 of this year.

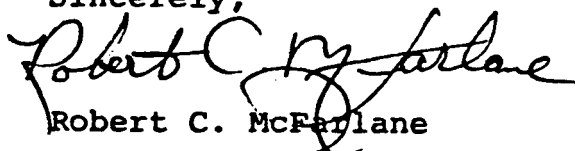
Rather than resume the legislative debate on the merits of NSDD-84, we would prefer to work cooperatively with Congress to develop a mutually-acceptable solution to this problem. Therefore, at the direction of the President, I issued a memo to all agencies affected by NSDD-84, directing that "implementation of two provisions of that directive be held in abeyance." I understand that you and other Members of Congress have expressed concern that, unless legislation is passed to extend the legislative prohibitions that expire on April 15, paragraphs 1(b) and 5 of NSDD-84 might be reinstated. I can assure you that is not now, and never has been, our intention.

The President has authorized me to inform you that the Administration will not reinstate these two provisions of NSDD-84 for the duration of this session of Congress. It is our hope that, over the coming months, you and other Members of Congress will work with the Administration in the spirit of cooperation to devise a solution to the problem of unauthorized disclosures of classified information. Because H.R. 4681 does not present a solution to this problem, we are opposed to its enactment.

This is a serious problem that will not go away, and we therefore cannot completely foreclose future action along the lines of NSDD-84 if a legislative solution to unauthorized disclosures is not found. I would reiterate, however, that no such action will be taken for the duration of this session. Moreover, in order to facilitate congressional involvement in any future action to address this problem, the Administration will notify your Subcommittee of any such intended action at least 90 calendar days prior to its effective date.

I trust that this will resolve questions about the status of NSDD-84 and permit your Subcommittee to proceed to consider H.R. 4681 without the pressure of an April 15 deadline.

Sincerely,



Robert C. McFarlane

Honorable Patricia Schroeder
Chairwoman
Subcommittee on Civil Service
Committee on the Post Office and Civil Service
U.S. House of Representatives
Washington, D.C. 20515

cc: Rep. Charles Pashayan